Filed 1/23/19 P. v. Hernandez CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. HECTOR HERNANDEZ, Defendant and Appellant.	B288853 (Los Angeles County Super. Ct. No. TA144336)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura R. Walton and Patrick Connolly, Judges. Affirmed.

James Renteria, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant Hector Hernandez was charged with possession for sale of a controlled substance (methamphetamine) in violation of Health and Safety Code section 11378 (count 1).[1] The information also alleged that on May 15, 2012, he had suffered a prior conviction in case No. TA123182 for possession of a controlled substance in violation of section 11351. After a bench trial, the trial court found defendant guilty as charged and found true the prior conviction allegation. Defendant appeals from the resulting judgment of conviction.

Defendant's appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, identifying no issues and requesting that this court review the record and determine whether any arguable issue exists on appeal. We have reviewed the record, conclude the record reveals no arguable issue on appeal, and thus affirm.

FACTUAL BACKGROUND

The following is a summary of the testimony in the December 22, 2017 court trial before Judge Patrick Connolly.[2]

On September 25, 2017, defendant was a passenger in a car traveling in Compton. Deputy Sheriffs Wilson Ordonez and Gabriel Moran initiated a traffic stop. Deputy Ordonez approached the passenger seat of the car and noticed defendant making movements with his left hand near the center console

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[1] Undesignated statutory citations are to the Health and Safety Code.

[2] We refer to the trial judges by name because of the nature of defendant's claims in his supplemental appeal briefs, which we describe in our Discussion section.

and defendant's thigh. Deputy Ordonez asked defendant, " 'Do you have a weapon or anything I need to worry about?' " Mr. Hernandez replied in Spanish, " 'Tengo cristal,' " which the reporter recorded as " 'I have cristal.' " Deputy Moran also heard defendant's use of the word " 'crystal.' "

Upon arresting and searching defendant, Deputy Ordonez recovered from defendant's left front pocket a clear plastic bag containing a substance the officer believed to be methamphetamine. Attached to that bag was a "small bindle" also containing a substance resembling methamphetamine. The officer found in the same pocket a second similar bindle apparently containing methamphetamine. Deputy Moran witnessed the recovery of these items as well, and believed they contained methamphetamine. Deputy Ordonez testified that defendant did not appear to be under the influence of methamphetamine and did not have drug paraphernalia at the time of his arrest.

Deputy Moran testified that the officers read defendant his *Miranda*[3] rights in Spanish. Defendant signed a *Miranda* waiver, which was marked as exhibit 4. Defendant wrote on that exhibit in Spanish the following translated statement: " 'What they found on me is mine. I sell—I just sell dimes. I only sell small amounts.' " Deputy Moran recounted that defendant also orally admitted that "the narcotics belonged to him, and that he's not a big drug dealer, just a small drug dealer."

A criminalist testified that he tested the substance in one of the bags retrieved from defendant, and that it contained methamphetamine. The bag weighed a little over 26 grams. He

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

weighed, but did not test the substances in the other two bags. He also testified that the weight for "those two other smaller items" was "about 1.89 grams," and responded affirmatively that this was the weight "for both of those items."

Deputy Moran provided expert testimony based upon his training and experience, that defendant possessed the drugs for sale and not personal use. He based this opinion on "the quantity of the narcotics, the suspect not being under the influence, the suspect not possessing any paraphernalia, and the suspect admitting to us and providing us a statement that he sold." Deputy Moran further opined that the average narcotics user possesses one to two grams of methamphetamine for personal use, far less than the over 26 grams recovered from defendant.

Defendant testified in his defense. He admitted having methamphetamine in his pocket but "[i]n no way was . . . planning on selling it." He acknowledged being an addict and that he used methamphetamine for three-day periods without sleeping. When asked how much methamphetamine he ingested at a time, he responded, "more than three or four grams." He reiterated that when he was arrested, the methamphetamine found in his pocket was only for personal use. He also stated there was only one bag of methamphetamine in his pocket, not three.

Defendant's rap sheet was admitted into evidence. Based on the rap sheet, the trial court allowed the charging document to be interlineated to reflect the correct date of defendant's prior conviction—July 26, 2012.

After hearing the parties' closing arguments, the trial court found defendant guilty as charged for possession of a controlled substance for sale and found true the allegation that defendant

had a prior conviction. The trial court reasoned that defendant's "statement, for the most part, corroborated what both deputies testified to." The trial court found further corroboration in the written statement in exhibit 4 that it "accept[ed]" was in defendant's handwriting despite defendant's protestations to the contrary while the trial court was announcing its decision.[4]

PROCEDURAL BACKGROUND

We set forth below additional procedural events relevant to this appeal.

On October 13, 2017, Judge Joel M. Wallenstein presided over the preliminary hearing. At that hearing, defense counsel told Judge Wallenstein his client would plead to a possession charge, but counsel did not know "how to get a better deal" than the People's offer of 30 days of service with 17 days credit with the California Department of Transportation given the "30 grams of meth."

At the December 15, 2017 pretrial conference at which Judge Laura R. Walton presided, Judge Walton noted that the People had offered time served. Defense counsel explained that defendant was concerned about whether accepting the deal would result in his being deported. Defense counsel indicated that the "big hang up" was that defendant had "a much more serious case" in a different courthouse, which could subject defendant to deportation anyhow were he found guilty in that case.

Defendant then waived trial by jury. When asked by the prosecutor whether he wished to give up his right to a jury as to guilt on the charges against him, defendant responded "[y]es" and

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[4] We note that at the preliminary hearing, Officer Ordonez testified that defendant wrote the statement himself.

then when asked whether he "agree[d] to a court trial," defendant answered "[y]es." Defense counsel joined in the jury trial waiver. Judge Walton set a December 22, 2017 trial date.

Defendant then requested a continuance to attempt to locate a witness. Judge Walton was amenable to the continuance. When the prosecutor objected because his witnesses had been subpoenaed for the December 22, 2017 trial date, the judge denied the continuance also noting that the information was filed on October 26, 2017.

At the sentencing hearing on February 2, 2018, at which Judge Patrick Connolly presided, defendant made what Judge Connolly treated as an oral *Marsden*[5] motion. We detail the hearing on that motion because defendant raised issues there that he also discusses in his supplemental appeal briefs.

Defendant asserted that his attorney promised to transfer the case to the courtroom handling his other case, apparently involving a Penal Code section 243 charge. Judge Connolly did not believe defense counsel made such a promise given that the judge himself did not have the power to make that promise. Defendant faulted his counsel for pressuring him to waive a jury. He also claimed defense counsel promised to bring a witness. Defense counsel responded that the witness would not testify that the drugs were his and did not want to be involved. Under those circumstances, it would have been "incompetent" to call that witness. He also explained one reason for encouraging a bench trial—the large quantity of methamphetamine defendant had at the time of his arrest.

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[5] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

Judge Connolly denied the *Marsden* motion and told defendant that he could represent himself if he did not want defense counsel to represent him. After giving defendant time to speak with defense counsel, defendant agreed to defense counsel's continued representation.

At the February 2, 2018 sentencing hearing, Judge Connolly referenced defendant's failure to accept the People's "extremely generous" plea offer and that he "respect[ed]" that decision, which the judge observed was based on defendant's immigration concerns. Judge Connolly then selected the low term of 16 months for count 1, which defense counsel had requested, and imposed a consecutive three-year enhancement pursuant to section 11370.2, subdivision (c) for defendant's prior conviction. Judge Connolly allowed defendant to serve his sentence in county jail. Judge Connolly also indicated his intent to run defendant's sentence concurrently with any custody time ordered in the other case if defendant were convicted in that other case. Because defendant's prior conviction was "recent," he denied defense counsel's request to stay the three-year sentence on the prior conviction enhancement. He awarded total credits of 258 days. He also imposed fines and fees.

On February 28, 2018, Judge Connolly struck the prior conviction enhancement because "[t]he law has changed." He then resentenced defendant to the high term of 3 years in county jail. This resulted in a 16-month reduction of sentence. Defendant received total credits of 310 days. Judge Connolly stated, "[E]verything else is to remain the same."

DISCUSSION

Defendant filed a timely notice of appeal. We appointed counsel to represent defendant. After examining the record,

counsel filed a *Wende* brief raising no issues on appeal and requesting that we independently review the record. (*People v. Wende*, *supra*, 25 Cal.3d 436.)

This court and his counsel advised defendant of the opportunity to file a supplemental brief. Defendant filed three supplemental briefs, one on December 6, 2018 and two on December 17, 2018. On January 8, 2019, appellant requested leave to file a fourth supplemental brief for the court "to review the new-facts found in this case." He does not describe these "new-facts." Although defendant's request is untimely, we nonetheless grant defendant permission to file the request. Ruling on the merits of his request to file a fourth supplemental brief, we cannot consider evidence that was not part of the record below. (*Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 631-632; see also *People v. Ray* (1956) 146 Cal.App.2d 257, 260.) Accordingly, we deny appellant's motion to file a fourth supplemental brief to address "new-facts." On January 14, 2019, defendant filed a request to file a motion regarding "new evidence," which would have been a fifth supplemental brief. On the same day, we denied that request.

Defendant makes the following arguments in his three supplemental briefs: (1) He did not have the opportunity to testify before a jury and his lawyer gave him bad advice and pressured him to give up a jury trial; (2) his "point of view" was "not heard" and the trial judge did not "give me a chance to explain myself or tell my story what really happen[e]d"; (3) he was not "give[n] . . . a chance to testif[y]"; (4) his lawyer "acted again[s]t me" and called me a "stupid person[ ] for all the drugs"; (5) the drugs found in the car belonged to his friend and he "only use[d] the drugs with [his] friend"; (6) he had no intention to "sale

the drugs," there was no drug paraphernalia, cash, or a scale at the crime scene, and he had a legitimate food truck business; (7) Judge Connolly was offended by defendant's not taking the plea deal, tried to "scare" him into taking the deal, threatened him with six years in prison, and "[i]n every moment the Judge Patt was showing his frustration again[s]t me"; (8) criticized Judge Walton when defendant requested a trial continuance; (9) defendant wanted another trial before a different judge; and (10) when he waived jury, he expected to be in front of "the same judge." (Underlining omitted.)

We conclude that defendant has not demonstrated reversible error.

First, the record does not support defendant's assertions that he was not heard or allowed to tell Judge Connolly "what really happened." Defendant testified at trial. Judge Connolly gave him wide berth when defendant recounted the events. Judge Connolly did not interrupt him or otherwise make comments during defendant's testimony.

Second, to the extent defendant asks us to credit his view of the evidence, we cannot do so. On appeal, we do not reweigh evidence or make credibility determinations. We are required to make all inferences in favor of the judgment. (See *People v. Boyer* (2006) 38 Cal.4th 412, 480.) The main issue at trial was whether the methamphetamine found on defendant at the time of arrest was for personal use or sale. Defendant's own admission that he "sold" and the officers' and criminalist's collective testimony about the facts supporting an inference of possession for sale were substantial evidence of possession for sale in support of Judge Connolly's findings.

Third, the record does not reflect that Judge Connolly was biased against defendant because defendant chose not to accept the People's time-served offer. For example, Judge Connolly did not assess the maximum sentence and allowed defendant to serve his sentence in county jail and his time to run concurrently with custody time, if any, imposed in the case in the other courthouse. Regarding defendant's continuance request, Judge Walton was well within her discretion to deny that request because of concerns about witness availability and the age of the case. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 650.)

Finally, we interpret defendant's criticisms of his trial defense counsel, including counsel's advice to waive a jury, as arguments that defendant received ineffective assistance of counsel. These arguments are more appropriately raised by a writ of habeas corpus because the record on appeal is insufficient to address defendant's claims. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

We have examined the entire record and are satisfied that defendant's appellate attorney has complied with his responsibilities and that no arguable issue exists. (*People v. Wende*, *supra*, 25 Cal.3d at pp. 438-441; see also *Smith v. Robbins* (2000) 528 U.S. 259, 278-284.)

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.